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## Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship

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*Using Nietzsche's great essay on the uses and disadvantages of history for life as his jumping-off point, Judge Posner examines the utility of the study of history for adjudication and legal scholarship. He argues, following Nietzsche, that the wrong kind of historical study can be very bad for "life," including law, while the right kind—the kind deployed by a pragmatic judge or a policy-oriented legal scholar—may deviate from literal accuracy in the direction of a rhetorical and imaginative narrative of historical events that can be constructively employed in a forward-looking approach to legal problems.*

Law is the most historically oriented, or if you like the most backward-looking, the most "past-dependent," of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history. It is suspicious of innovation, discontinuities, "paradigm shifts," and the energy and brashness of youth. These ingrained attitudes are obstacles to anyone who wants to reorient law in a more pragmatic direction. But, by the same token, pragmatic jurisprudence must come to terms with history. Where better, then, to begin an examination of the historicist approach to law than with Nietzsche's

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great essay on history?<sup>1</sup> It is one of the founding documents of pragmatism and a powerful, although oblique, challenge to conventional methods of doing law.

## I. NIETZSCHE ON HISTORY

To understand Nietzsche's essay we'll have to distinguish the *study* of history, and thus history as a way of relating to, interpreting, or explaining the past (*Geschichte*), from history as simply events, chronology, or record of the past (*Historie*).<sup>2</sup> It is history in the first sense that is Nietzsche's target. He does not deny that there are knowable facts about things that happened in the past; he is not a postmodernist crazy. But the sum of those facts, devoid of analysis, interpretation, or causal ascriptions, is not what we mean by historical understanding, and such understanding is elusive. Yet Nietzsche is not, at least in the essay that I am considering, an *epistemic* skeptic about *either* type of history. He does not deny that we can know that Napoleon Bonaparte abdicated for the second time in 1815, or even that we can know that Napoleon did (or did not) accelerate the emergence of German nationalism.<sup>3</sup> He is skeptical about the social rather than the truth value of *Geschichte*. He audaciously contends that the quest for historical understanding can have a debilitating effect on meeting the challenges of the present and the future.

<sup>1</sup> See Friedrich Nietzsche, *On the Uses and Disadvantages of History for Life*, in Friedrich Nietzsche, *Untimely Meditations* 57 (Cambridge 1983) (R.J. Hollingdale, trans). The essay was first published in 1874. Page references to it appear in the text of this Article. I have found only one previous discussion of Nietzsche's essay in the legal literature: Donald P. Boyle, Jr., Note, *Philosophy, History, and Judging*, 30 Wm & Mary L Rev 181, 185–89 (1988).

<sup>2</sup> The distinction is well articulated in Carl L. Becker, *Everyman His Own Historian*, 37 Am Hist Rev 221 (1932); Lionel Gossman, *Between History and Literature* ch 9 (Harvard 1990) (distinguishing between historical research and historical interpretation); C.A.J. Coady, *Testimony: A Philosophical Study* 233–36 (Oxford 1992) (distinguishing between historical facts, on the one hand, and historical theory, or scientific history—"an imaginative reconstruction of the past"—on the other). Coady takes sharp issue with Collingwood's skepticism about historical facts. See Coady, *Testimony* at ch 13 (critiquing R.G. Collingwood, *The Idea of History* (Oxford 1970)). *Historie* corresponds to the quest for truth at the level of the trial court; and it may be that rather similar methods and problems attend both the historical and the adjudicative quest for factual truth, as suggested by the philosophical discourse on "testimony," well illustrated by Coady's book, which treats both quests. But I do not pursue that relation between history and law in this Article.

<sup>3</sup> The idea that historical theories are a legitimate species of scientific theory is strongly argued in Murray G. Murphey, *Philosophical Foundations of Historical Knowledge* ch 7 (SUNY 1994). This is not to deny the *practical* indeterminacy of much historical theorizing; I give examples later. On the general question of skepticism about historical knowledge, see Arthur C. Danto, *Narration and Knowledge* (Columbia 1985). And for a powerful empirical demonstration that historical fact is recoverable even when it concerns episodes that arouse intense political passions, see Alan B. Spitzer, *Historical Truth and Lies about the Past: Reflections on Dewey, Dreyfus, de Man, and Reagan* (North Carolina 1996).

He makes three specific points in support of this contention. The first is that the academic study of history, the attempt to reconstruct the past with scrupulous accuracy—the *wie es eigentlich gewesen ist* (“how it really was”) school of Leopold von Ranke and his followers, against which Nietzsche was writing—is disillusioning, and we need illusions to achieve anything. “Historical verification always brings to light so much that is false, crude, inhuman, absurd, violent that the mood of pious illusion in which alone anything that wants to live can live necessarily crumbles away” (p 95). People who have a potential for greatness need “a monumentalistic conception of the past,” from which they learn that “the greatness that once existed was in any event once *possible* and may thus be possible again” (p 69). “One giant calls to another across the desert intervals of time and, undisturbed by the excited chattering dwarfs who creep about beneath them, the exalted spirit-dialogue goes on” (p 111). This conception of history is to be contrasted with a determinist theory of history, the “idolatry of the factual” (p 105), in which every event in history is seen as a link in an inexorable chain of causes and effects—a view that excludes the possibility of human freedom or creativity. Ironically, the type of historical sense that Nietzsche deplores is nowhere better illustrated than in the work of his epigone Michel Foucault, who, for example, in his history of criminal punishment since the eighteenth century,<sup>4</sup> finds nothing of greatness or even progress but only an ever more insidious weaving of the sinews of power, a tapestry of individual helplessness. Such a method of doing history breeds a cynicism that is quietistic, even paralyzing.

Nietzsche’s second criticism of the historical sense, which is only superficially inconsistent with the first, is that it breeds complacency by making us think that we are better people than our forebears. We might call this “datism” and illustrate it by the current left-wing criticisms of Aristotle for misogyny and Washington and Jefferson for owning slaves. History, Nietzsche observes, “leads an age to imagine that it possesses the rarest of virtues, justice, to a greater degree than any other age” (p 83). The concept of moral progress, which is definitionally historicist, invariably makes us look good in comparison to our predecessors because it is assessed from the standpoint of the present; it is our values that determine what is to count as progress. The naive think that “to write in accord with the views of their age is

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<sup>4</sup> See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage 1977) (Alan Sheridan, trans). Yet Foucault’s historical method derives from Nietzsche, specifically the “genealogical” methodology of *On the Genealogy of Morals*. See Brian Leiter, *What is ‘Genealogy’ and What is the Genealogy?*, in Brian Leiter, *Nietzsche on Morality* ch 4 (forthcoming Routledge 2001). The *Genealogy* was written many years after Nietzsche’s essay on history; I briefly consider the relation between the two in Part III.

the same thing as being just"; hence "their task is to adapt the past to contemporary triviality" (p 90).

The relation to the first criticism is that both the sense of paralysis and the sense of progress come from the same thing, the fact that "every past . . . is worthy to be condemned" (p 76). Some people react to the horrors and follies of the past with despair and others with complacency; neither mindset is conducive to a wholehearted, energetic, and optimistic address to current problems.

We might call the first criticism a criticism of history as belittling the past and the second a criticism of history as glorifying the present. Nietzsche's third criticism of the historical sense—call it belittling the present—is his most interesting and least developed. It was developed further by Max Weber, who in this respect is another of Nietzsche's epigones;<sup>5</sup> and in relation to literary creativity by Harold Bloom.<sup>6</sup> It is that a lively consciousness of the past induces a sense of belatedness. It makes us feel like "latecomers," living "in the old age of mankind" (pp 83, 109), and to old age "there pertains an appropriate senile occupation, that of looking back, of reckoning up, of closing accounts, of seeking consolation through remembering what has been, in short historical culture" (p 109).

This point is related to Nietzsche's first criticism in inducing a sense of hopelessness, futility, or incapacity and despite appearances is not inconsistent with the second (that the study of history induces complacency). We may think we've made moral progress, and of course economic, scientific, and technological progress as well, but we cannot imagine ourselves on a plane with Jesus, Socrates, the Buddha, and the other great moral innovators of the past. And where we have made unquestionable progress it is due largely to specialization. We cannot imagine a scientist of today having the breadth of achievement as a Newton, or an economist having the breadth of an Adam Smith, or a biologist who could have as revolutionary an impact as Darwin. We cannot imagine a conqueror on the scale of Alexander the Great, or a military genius to equal Napoleon, or that there will ever be a Chief Justice of the United States to rival John Marshall.<sup>7</sup>

These pessimistic predictions could reflect just a lack of imagination; Nietzsche is far from endorsing the feeling of belatedness that an immersion in history creates. In fact, since 1874 a number of giants

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<sup>5</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism* 180–83 (Scribner 1958) (Talcott Parsons, trans.).

<sup>6</sup> Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* 49–73 (Oxford 1973).

<sup>7</sup> Holmes seems to have had a sense of belatedness in relation to Marshall. See Oliver Wendell Holmes, Jr., *John Marshall*, in Richard A. Posner, ed., *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* 206 (Chicago 1992).

(a category that includes monsters as well as geniuses and saints) have crossed the world stage, including Freud, Yeats, Einstein, Wittgenstein, Lenin, Hitler, Ghandi, Churchill, Kafka, Weber, Holmes, Joyce, Stravinsky, and Picasso. What seems to be true, however, is that the scope and possibility of genius, of greatness, of true individualism and breathtaking individual achievement diminish, and a sense of belatedness becomes marked, as greater and greater areas of human life are brought under the rule of rationality by the trend to specialization (division of labor), to bureaucratic (as distinct from charismatic or tyrannical) governance, and to universal education, media-induced sophistication, the automation of many tasks formerly requiring human skills, the increasing utility of natural and social science in addressing social and personal problems rationally and systematically, and (as part of the advance of science and technology) improved therapeutic intervention to correct physical and mental defects and normalize abnormal personalities. Earlier generations, including generations far earlier than Nietzsche's, had a sense of belatedness; you can find it in Hesiod, in Homer's generation. But modern conditions make it more plausible than ever before.

The sense of belatedness has an undercurrent of complacency as well as of defeatism, which relates the third of Nietzsche's criticisms of the historical sense to the second. If humanity has reached a collective old age, this means that it has experienced maturity—has, in other words, peaked—and so there is a temptation to equate humankind's current "miserable condition" to "a completion of world-history . . . so that for Hegel the climax and terminus of the world-process coincided with his own existence in Berlin" (p 104). Yet what we think of as civilization is only about 5,000 years old. For all we know, there may be a thousand, a hundred thousand, or even a million or more epochs of that length before homo sapiens departs the scene (perhaps for other planets). So, in a curious sense, the historical perspective, the perspective that makes us feel like latecomers, distorts a proper sense of where we are in history.

The third criticism may seem to be in tension with the first and second in targeting a form of monumentalistic historicism in which the greatness of the past is highlighted—a form that might seem the very opposite of the belittling historicism that is the target of the other criticisms. But the tension dissolves when we recognize that the type of monumentalistic history decried in the third criticism is the type that belittles the present, which is as debilitating as belittling the past. The Lilliputian historians deprive the present generation of needed models of achievement (those giants calling to each other over the desert intervals of time) or breed a contemptuous attitude toward the past, while the belittling monumentalizers "do not desire to see new

greatness emerge: their means of preventing it is to say 'Behold, greatness already exists!' . . . They act as though their motto were: let the dead bury the living" (p 72).

Nietzsche does not argue that the study of history has no possible value. This is apparent from his commending the type of monumentalistic history that exhibits to the present achievable models from the past. That is history "in the service of the future and the present and not for the weakening of the present or for depriving a vigorous future of its roots" (p 77). It is thus history "in the service of life" in which "[t]he study of history is something salutary and fruitful for the future only as the attendant of a mighty new current of life, of an evolving culture for example, that is to say only when it is dominated and directed by a higher force and does not itself dominate and direct" (p 67). The study of history should be oriented toward enlarging our "plastic power," which is "the capacity to develop out of oneself in one's own way, to transform and incorporate into oneself what is past and foreign, to heal wounds, to replace what has been lost, to recreate broken moulds" (p 62). In short, "history belongs above all to the man of deeds and power, to him who fights a great fight, who needs models, teachers, comforters and cannot find them among his contemporaries" (p 67). Still, if a certain kind of history is bad for you, a certain kind of forgetfulness must be good for you: this is the most arresting implication of the essay. Mythmaking through selective remembrance and selective forgetting is Nietzsche's conception of socially worthwhile history.

Nietzsche's criticisms of the study of history are psychological in character; too much history, or history of the wrong kind (psychologically wrong, not inaccurate—Nietzsche does not value accuracy for its own sake<sup>8</sup>), fans emotions that impede achievement. Any doubt that Nietzsche was on to something has been dispelled by events in Yugoslavia; the Serbian preoccupation with history, and in particular with the (possibly mythical) Battle of Kosovo between the Turks and the Serbs in 1389, is bad for the Serbs, as well as for their neighbors. The Serbs could do with a dose of forgetting.

There is also reason to be concerned about untoward *cognitive* consequences of studying history, though Nietzsche barely hints at them. Historical knowledge takes up space in the brain, leaving less room for other intellectual material. It is not useless knowledge, at least if its emotional effects are put to one side; it provides a stock of precedents that can be used to solve current problems. But precedents

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<sup>8</sup> "History in the service of life can never be scientific history." Werner Dannhauser, *Introduction to History in the Service and Disservice of Life*, in Friedrich Nietzsche, *Unmodern Observations* 73, 79 (Yale 1990) (William Arrowsmith, ed).

provide *good* solutions to current problems only if the present resembles the past very closely. If it does not, then a person who “only repeats what he has heard, learns what is already known, imitates what already exists” (p 123) will not be able to solve any of these problems. History provides a template for framing and “sizing” contemporary problems; but the template may prove to be a straitjacket. The use of historical analogies (“another Munich”) is full of pitfalls.<sup>9</sup> Hence the adage that the only lesson of history is that there are no lessons of history.

I find Nietzsche’s essay on history immensely stimulating, fruitful, and useful, but I do not want to leave the impression that I agree with it entirely. His emphasis on a purely instrumental approach to history writing could be thought a license for rewriting history, the sort of thing that the Soviet Union did and that Orwell parodied in *Nineteen Eighty-Four*. Nietzsche’s essay illuminates a parallel instrumental conception of history-writing by judges and other legal professionals, and it is a conception open to similar objections to those that can be lodged against Nietzsche’s essay.

## II. THE IMPLICATIONS OF THE CRITIQUE OF HISTORY FOR ADJUDICATION

We should not expect Nietzsche’s criticisms of historiography to be fully applicable to the law’s use of history. Nietzsche was preoccupied with the concept of genius;<sup>10</sup> and his criticisms of the historical approach seem motivated primarily by a sense of the incompatibility of genius with a certain kind of historical knowledge or sense. The essay does two things, however, that bear importantly on law. First, it opens up the question whether the historical sense is an unalloyed blessing (and thus whether, for example, Santayana’s aphorism that those who forget history are condemned to repeat it is the truism that it is usually taken to be); it problematizes what had been taken for granted. Second, and related, it invites us to think of historical inquiry and the historical sense as instruments rather than things of intrinsic value oriented exclusively to truth. Truth is a good, but there are other goods, which forgetting or even forging the historical record might promote.

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<sup>9</sup> A more contemporary and less familiar example is how the “template” of the Battle of the Bulge contributed to the failure of the American military command in Vietnam to take adequate measures in preparation for the 1968 Tet offensive. The command believed that the enemy was on the ropes and might, like the Germans in 1944, launch a desperate offensive; but the fact that the German offensive had failed and that Germany had been utterly defeated within months bred complacency about the likely consequences of such an offensive by the North Vietnamese. See James J. Wirtz, *The Tet Offensive: Intelligence Failure in War* 129–32 (Cornell 1991).

<sup>10</sup> The notion that in the nineteenth century “genius” was a career, and one to which Nietzsche aspired, is argued in Carl Pletsch, *Young Nietzsche: Becoming a Genius* (Free Press 1991).



As Nietzsche says elsewhere, “there exist very salutary and productive errors.”<sup>11</sup>

The critique of history that Nietzsche’s essay inaugurates, more than the details of his critique, has major implications for legal theory. Law is history-laden to a remarkable extent, though less so (as I am about to argue) than is sometimes supposed. We can distinguish three different types of use to which law has put history: a rhetorical, an informational, and a normative.

#### A. History as Idol and as Mask

Extreme versions of a tendency to make, or at least pretend to make, the past rule the present in law are found in Blackstone, who thought the aim of the common law of England should be to revive the customary law of *Anglo-Saxon* England,<sup>12</sup> which is to say the law of a regime that had been extinguished 700 years earlier; and in Savigny, the founder of the historical school of jurisprudence, who thought that the study of Roman law was the key to improving modern law.<sup>13</sup> But Blackstone’s version (or Savigny’s) is just that—an extreme. It isn’t *fundamentally* different from the belief held by a great many modern American lawyers, judges, and law professors that the answers to modern questions of constitutional law can be found in the text or background of the Constitution, a documentary palimpsest most of which was drafted more than two centuries ago.

A moment’s thought will suggest another possibility, however—that the ostensible use of history, whether by Blackstone or Savigny or the Justices of the U.S. Supreme Court, is not a sign of thralldom to history but of the opposite, of bending history to the service of life, Nietzsche-fashion. Neither Blackstone nor a modern judge (or shadow-judge law professor) is comfortable saying, “This is what the law ought to be today, regardless of what it was yesterday, because we have new problems and need new solutions.”<sup>14</sup> That is the kind of thing a politician might say, but it doesn’t sound like the utterance of a legal professional, as it has nothing of the esoteric or the arcane about it. The professional wants to say, “I can employ my special skills to

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<sup>11</sup> Friedrich Nietzsche, *David Strauss, the Confessor and the Writer*, in Nietzsche, *Untimely Meditations* 3, 3 (cited in note 1).

<sup>12</sup> See William Blackstone, 4 *Commentaries on the Laws of England* 413 (Chicago 1979); Thomas A. Green, *Introduction*, in William Blackstone, 1 *Commentaries on the Laws of England* i, iii, xii (Chicago 1979).

<sup>13</sup> Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* 139–41 (Littlewood 1831) (Abraham Hayward, trans.).

<sup>14</sup> But see Carl E. Schorske, *Thinking with History: Explorations in the Passage to Modernism* 88 (Princeton 1998) (“[W]hen men produce revolutionary changes, they screen themselves from their own frightening innovations by dressing themselves in the cultural clothing of a past to be restored.”).

find the already existing solution to the new (or new-seeming) problem in authoritative decisions made centuries ago.”<sup>15</sup> This claim is an illusion, as legal realists and critics of lawyers’ history like to point out.<sup>16</sup> Think of the sexual privacy cases, which culminated in *Roe v Wade*.<sup>17</sup> The first of them, *Griswold v Connecticut*,<sup>18</sup> was decided in 1965, a century after the Fourteenth Amendment, which furnished its ostensible ground, was adopted. The law of free speech barely existed before the 1950s—even that late its scope was distinctly limited because of fear of communism—and yet it is supposed to have been promulgated in 1789, when the First Amendment was ratified. Much of what passes for constitutional law is a modern construct, but it is defended by reference to ancient (as Americans measure historical time) texts to which it is tenuously and often only opportunistically linked. But though its ancientness is an illusion, Nietzsche teaches us that historical illusions can be empowering, can free us from the dead hand of the past. The legal profession’s use of history is a disguise that allows the profession to innovate without breaching judicial etiquette, which deplores both novelty and a frank acknowledgement of judicial discretion and likes to pretend that decisions by nonelected judges can be legitimated by being shown to have democratic roots in some past legislative or constitutional enactment. Since the most convincing deceptions are those rooted in self-deception (because then the deceiver is not in danger of giving himself away), one is not surprised that many lawyers and judges think of law as the application to the present of the lessons of the past as reflected in statutes, reported decisions, and other materials created in the past to govern the future. Yet the truth is that, for the most part, these past settlements of disputes frame and limit, but do not dictate, the outcome of today’s cases.

The law’s rhetorical use of history is entwined with the idolatry of the past that is a conspicuous feature of conventional legal thought

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<sup>15</sup> This is very much the spirit of Savigny’s opposition to the codification of law. He described pre-code law, particularly Roman law, as “the scientific element, properly so termed, whereby our calling acquires a scientific character.” Savigny, *Of the Vocation of Our Age* at 163 (cited in note 13). See also Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L Q Rev 326 (1937); Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 Colum L Rev 681, 686–89 (1951); Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 Va L Rev 535 (2000).

<sup>16</sup> See, for example, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S Ct Rev 119; Martin S. Flaherty, *History ‘Lite’ in Modern American Constitutionalism*, 95 Colum L Rev 523 (1995); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L Rev 87 (1997); Barry Friedman and Scott B. Smith, *The Sedimentary Constitution*, 147 U Pa L Rev 1 (1998). For a recent study that casts great doubt on a key orthodoxy of constitutional lawyers’ history—the impact of Madison’s constitutional theory on the drafting and ratification of the Constitution—see Larry D. Kramer, *Madison’s Audience*, 112 Harv L Rev 611 (1999).

<sup>17</sup> 410 US 113 (1973).

<sup>18</sup> 381 US 479 (1965).

and that could conceivably be likened to the type of “monumentalistic” history-writing that Nietzsche commends. A backward-looking orientation invites the criticism that the dead should not be allowed to rule the living, and one way to rebut it is to argue that our ancestors had a freshness of insight or power of thought that is denied to us moderns; they are our betters and we should be content to be in thrall to them. This is a mistake, I’ll argue.

Nietzsche does not consider how an essentially deceptive conception of the law’s relation to the past can be maintained year after year, decade after decade, century after century. Even in today’s United States—a society having a much higher level of education, legal sophistication, disrespect for authority, intellectual diversity, and individual liberty than Imperial Germany in Nietzsche’s day—the mask remains firmly in place. Most people take for granted that the Supreme Court’s constitutional decisions, even in the area of sexual and reproductive liberty, are in some meaningful sense rooted in the Constitution itself. Probably even most legal professionals believe this, though perhaps their belief is that morally dubious form of quasi-belief that Sartre called “bad faith.” In the rhetoric of constitutional law, Nietzsche’s illusionistic concept of historical writing holds sway. The judges invoke the authority of the ancient texts, deify the framers (great calling to great over the desert intervals of time), and in short create a fictive history in service of a contemporary, pragmatic project. Most professors of constitutional law, even such “theorists” as Ronald Dworkin, cheer them on, though sometimes opposing their own fictive history to that of the judges. So firmly is the mask in place that even disinterested critics of the Supreme Court’s historical sense are more likely to call for better history than for no history. The result is to marginalize their criticism by making it seem an argument in a technical dispute over details of historiography.

Dworkin is no “originalist” in the sense of someone who believes that modern constitutional issues should be decided by reference to the meanings that the words of the Constitution bore in the eighteenth century or to the mental horizons of the framers. Nor is Frank Michelman or Cass Sunstein. But as Laura Kalman points out, Sunstein and Michelman, like Dworkin, think it important to construct a historical pedigree for their desired constitutional interpretations; they want “to imbue the past with prescriptive authority.”<sup>19</sup> But, Kalman argues, it is a constructed rather than a found past. “The republican revivalists [Michelman and Sunstein] appropriated historians for advocacy purposes, permitting the present to overwhelm the past.”<sup>20</sup>

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<sup>19</sup> Kalman, 66 *Fordham L Rev* at 103 (cited in note 16).

<sup>20</sup> *Id* at 107.

They employ “the rhetoric of originalism.”<sup>21</sup> Kalman considers this rhetoric an indispensable condition of judicial innovation, given our legal culture. Maybe so (though I’ll express some skepticism about this later); and maybe the academics are just trying to speak a language that judges will understand rather than fooling themselves that they are doing history. But we should understand that what they are doing is indeed rhetoric, and not historiography. Later I shall argue that, paradoxical as this may seem, real originalists are *less* historicist than many antioriginalists—originalism is a *response* to historicism.

Kalman thinks that constitutional theorists “see through” their own historicism.<sup>22</sup> I worry that some judges fool themselves into thinking that history delivers the solutions to even the most difficult and consequential legal issues and thus allows them to duck the really difficult question—the soundness of the solutions as a matter of public policy. I think that at least some of the Justices of the Supreme Court would be hesitant to expand states’ rights in the name of the Constitution if they realized that constitutional history provided no guidance to resolving such issues as whether the Eleventh Amendment (which merely forbids a citizen of one state to sue another state in federal court) codifies a far-reaching doctrine of state sovereign immunity even from suits based on federal law.

## B. Path Dependence: Holmes and the Historical School

Not in constitutional doctrine or outcomes, but in a number of other respects, the law *is* in thrall to history, and not merely as a matter of judicial psychology. This point can be made perspicuous with the aid of the economists’ concept of *path dependence*, which means that where you end up may depend on where you start out from, even if, were it not for having started where you did, a different end point would be better. The best-known, although quite possibly spurious, example in the economic literature concerns the typewriter keyboard. According to the economic historian Paul David, the keyboard was designed to limit typing speed in order to prevent constant jamming of the keys. The jamming problem disappeared with the advent of electric typewriters and word processing, yet we are stuck with the old keyboard because the costs of getting agreement among manufacturers on a new keyboard and of “retooling” the millions of people who were trained on and have become habituated to the old one are prohibitive.<sup>23</sup> We can thus expect to observe path dependence when

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<sup>21</sup> Id at 124.

<sup>22</sup> See id at 110–11.

<sup>23</sup> See Paul A. David, *Clio and the Economics of QWERTY*, 75 Am Econ Rev 332 (1985). For a general analysis of the economics of path dependence, see Stanley M. Besen and Joseph

transition costs are high relative to the benefits of change, and they tend to be high when transition requires a high degree of coordination.

David's premise, that the conventional keyboard is inefficient, has been subjected to searing criticism as part of a larger questioning of the economic importance of path dependence.<sup>24</sup> I do not want to get into those issues; whatever the situation in competitive markets, where there are powerful incentives for efficiency, there can be little doubt that path dependence is an important phenomenon in law.<sup>25</sup> Some evidence of this is that the convergence of legal systems is much slower than the convergence of technology and economic institutions. The laws and legal institutions of the different states of the United States differ more than the economic practices and institutions of the states do, and the differences are still greater and more mysterious in a cross-country comparison, even when the comparison is confined to countries whose economic and political systems, and levels of education and income, are similar to ours.

It is hard to believe, for example, that the heavy use of the civil jury in the United States is unrelated to differences between English and Continental public administration that go back to the Middle Ages.<sup>26</sup> It is unlikely that if we were starting from scratch we would make the right to trial by jury turn on whether the plaintiff was seeking damages or an injunction—a distinction rooted in the historical accident that England developed two separate court systems for the two types of relief—or that statutes of limitations would vary as much as they do across states,<sup>27</sup> or that the level of detail in American law would be as great as it is, or that there would be as many procedural differences as there are between tort suits and breach of contract suits (since many wrongs can be pleaded under either heading—and ana-

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Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J Econ Persp 117 (1994).

<sup>24</sup> See S.J. Leibowitz and Stephen E. Margolis, *The Fable of the Keys*, 33 J L & Econ 1 (1990); S.J. Leibowitz and Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J L, Econ, & Org 205 (1995).

<sup>25</sup> See Larry Kramer, *Fidelity to History—And Through It*, 65 Fordham L Rev 1627, 1640–41 (1997), making a similar point. But Kramer attaches normative significance to law's path dependence, as I do not.

<sup>26</sup> See James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 2–3 (Little, Brown 1898). Although the civil jury may be a more efficient institution than its critics believe, see Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan L Rev 1477 (1999), the extent to which it is used today may owe much to factors unrelated to efficiency, such as the Seventh Amendment to the U.S. Constitution, which guarantees the right to jury trial in civil cases at law if the stakes exceed \$20—with no adjustment for the inflation that has occurred since 1789!

<sup>27</sup> See Richard A. Leiter, ed, *National Survey of State Laws* 107–17, 417–30 (Gale 3d ed 1999).

lytically tort and contract are interchangeable<sup>28</sup>). The modern law is full of vestiges of early law. If we were starting from scratch, we could design and (even with due regard for political pressures) would adopt a more efficient system, and this implies that there must be formidable obstacles to changing the existing one.

The law's obeisance to the past at the expense of the present and the future thus need not be attributed to a mystical, perhaps quasi-religious, veneration of ancient ways. It could just reflect transition costs, though here they arise not from a coordination problem, as in the typewriter-keyboard example, but from problems of information. It may be that judges, and perhaps legal professionals in general, are so bereft of good sources of information for deciding novel cases or reforming the institutions of the law to keep up with social change that their most efficient method of deciding cases and resolving issues of institutional design is to rely heavily on precedent, as is brought out in Dworkin's analogy of the common law to the writing of a chain novel.<sup>29</sup> The more heavily the judges rely on precedent, the more likely is current doctrine to be determined by history rather than by current needs.

We might describe this as the result of a kind of rational inertia. Legislators are not constrained by precedent, but their ability to innovate is limited by the inertia built into the legislative process, especially at the federal level in the United States. By creating an essentially tricameral legislature (the Senate, the House, and the President with his veto power), the Constitution makes it difficult to enact statutory law; but once enacted, it is, by the same token, difficult to change, because the legislative procedures for amending an existing statute are the same as those for promulgating a brand new statute. The Constitution, being difficult to amend, is itself a potent source of path dependence in the provisions that do not lend themselves to *aggiornamento* through interpretation.

Path dependence is a less serious problem at the doctrinal than at the institutional level of the law. By rejecting strict stare decisis American judges have empowered themselves to alter doctrine to keep abreast of changing circumstances. As a result, the structure of common law doctrine (broadly understood as doctrine forged in the process of deciding cases, whether or not they technically are common law cases) seems on the whole pretty efficient.<sup>30</sup> Generally worded provisions of statutes, constitutions, and contracts allow judges to mold them to current needs and values. Guido Calabresi has proposed that

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<sup>28</sup> See Richard A. Posner, *Economic Analysis of Law* ch 8 (Aspen 5th ed 1998).

<sup>29</sup> See Ronald Dworkin, *Law's Empire* 228–50 (Belknap 1986).

<sup>30</sup> See Posner, *Economic Analysis of Law* esp pt 2 ("The Common Law") (cited in note 28).

courts be allowed to “overrule” archaic statutes as if they were obsolete precedents,<sup>31</sup> and it is possible to argue that courts are already doing this, only calling what they do “interpretation.” The law also fights off the dead hand of the past directly by refusing to enforce some of the limitations that the makers of wills attempt to impose on their bequests and by the closely related cy pres doctrine, which allows charitable foundations to circumvent some of the conditions in the instrument creating the foundation.<sup>32</sup> Even at the institutional level, the legal system has proved resourceful in seeking to lift the dead hand of the past. The Seventh Amendment is immovable, but by shrinking the size of the civil jury (from the traditional 12 to 6), by expanded use of summary judgment to take cases away from juries, and by subtle pressures to substitute bench trials for jury trials, the federal judicial system has curtailed and domesticated the originally intended operation of the amendment.

Path dependence in law resembles another important concept, that of law’s autonomy. To the extent that a field, whether it be music, mathematics, or law, is autonomous, developing in accordance with its internal laws, its current state will bear an organic relation to its previous states. Many legal thinkers have aspired to make law an autonomous discipline in this sense, but it is a questionable aspiration. My own view is that law is better regarded as a servant of social need,<sup>33</sup> a conception which severs the law from any inherent dependence on its past.

The concept of path dependence can help us to distinguish between two influential nineteenth-century versions of legal historicism, that of Savigny and that of Holmes. Savigny believed that every nation, every “race” (in a cultural rather than biological sense), had a pre-institutional, indeed primitive, law-spirit, and that modern law had to conform to that spirit to be sound.<sup>34</sup> Hence the object of legal study and reform “is to trace every established system to its root, and thus discover an organic principle, whereby that which still has life, may be separated from that which is lifeless and only belongs to history.”<sup>35</sup> This is one of those aphorisms that seem sensible and even compelling at first glance but do not survive critical scrutiny. Even if (as seems very dubious) every modern legal doctrine has “evolved” in the sense

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<sup>31</sup> See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard 1982).

<sup>32</sup> For example, the cy pres doctrine allowed the March of Dimes Foundation to redirect its resources from polio to lung diseases when the polio vaccine largely eradicated polio.

<sup>33</sup> As I argue in Richard A. Posner, *The Problematics of Moral and Legal Theory* ch 4 (Belknap 1999).

<sup>34</sup> His own scholarship and teaching dealt almost entirely with Roman law, and so he had “to prove that he expressed the German *Volksgeist* by teaching Roman law.” Kantorowicz, 53 L Q Rev at 340 (cited in note 15).

<sup>35</sup> Savigny, *Of the Vocation of Our Age* at 137 (cited in note 13).

of developing out of some ancient, perhaps even prelegal, norm, why should the vitality or lifelessness of the modern doctrine depend on the vitality of the seed?

Holmes's historicism may owe some debt to Savigny,<sup>36</sup> because the method primarily employed in *The Common Law* is that of tracing back modern doctrines of the common law to their ancient roots.<sup>37</sup> But the spirit of Holmes's inquiry is entirely different from Savigny's (or from the spirit of Burke, which resembles and influenced Savigny's historicism). There is no veneration of the past. "The substance of the law at any given time," Holmes writes, "pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."<sup>38</sup> "The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."<sup>39</sup> This is just the idea of path dependence. The past exerts an *inertial* force.

Holmes had the advantage over Savigny of writing after Darwin. The process that Holmes describes is indeed an evolutionary one, in which adaptation is gradual because the existing forms cannot be shucked off overnight, just as the giraffe's long neck does not develop overnight in response to the appearance of a food supply at a height. This is why, as G. Edward White explains, Holmes recognized that "the law is simultaneously influenced by internal professional and extralegal factors, and that legal doctrine is the product of a complex interaction between those sets of factors."<sup>40</sup> The "internal professional" factors are the concerns with continuity and precedent that retard instant adaptation to changed circumstances and that correspond in evolutionary biology to the biological constraints on the pace and direction of evolutionary change.

Holmes's historicism is what might be called a corrective historicism. History is used to explain the existence of doctrines that have become vestigial; for once they are recognized as mere survivals, the path for reform is clearer. Criticizing Savigny and his followers, who believed that in Roman law possessory rights were limited to possessors who claimed ownership of the thing possessed, and who therefore thought that modern law in providing possessory remedies to lessees,

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<sup>36</sup> See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 149 (Oxford 1993).

<sup>37</sup> And here it is germane to note that "down to the Renaissance at any rate, Roman law was the common law of all Europe." James E.G. de Montmorency, *Friedrich Carl von Savigny*, in John Macdonell and Edward Manson, eds, *Great Jurists of the World* 561, 586 (Little, Brown 1914).

<sup>38</sup> Oliver Wendell Holmes, Jr., *The Common Law* 1-2 (Little, Brown 1881).

<sup>39</sup> *Id.* at 5.

<sup>40</sup> White, *Justice Oliver Wendell Holmes* at 195 (cited in note 36).



bailees, and others who lacked such claims had sacrificed principle to convenience, Holmes remarked:

I cannot see what is left of a principle which avows itself inconsistent with convenience and the actual course of legislation. The first call of a theory of law is that it should fit the facts. It must explain the observed course of legislation. And as it is pretty certain that men will make laws which seem to them convenient without troubling themselves very much what principles are encountered by their legislation, a principle which defies convenience is likely to wait some time before it finds itself permanently realized.<sup>41</sup>

### C. The Past as Normative

There is a fundamental difference between relying on the past either because we lack good information about how to cope with the present and future or because legal innovation involves heavy transition costs, and treating the past as normative, as when Paul Kahn says that legal arguments “begin from a commitment to the past,”<sup>42</sup> and that “the rule of law is for us the manner in which the authoritative character of the past appears,”<sup>43</sup> or when Anthony Kronman says that “the past is, for lawyers and judges, a repository not just of information but of value, with the power to confer legitimacy on actions in the present,” and “the past deserves to be respected merely because it is the past,”<sup>44</sup> or when Ronald Dworkin says that “the past must be allowed some special power of its own in court, contrary to the pragmatist’s claim that it must not.”<sup>45</sup> Why *must*? A possible answer is that justice demands that like cases be treated alike, and the happenstance that one case was decided long ago and the other is a current case does not sever the likeness. Fair enough; but it is not pastness that must on this view be allowed a special power; it is likeness. The only function of pastness is to remind us that the fact that a case was decided a year ago or a century ago does not in and of itself entitle a court deciding a current case to ignore it. The court must have a reason to ignore it, just as it must have a reason to ignore any source of possible guidance to deciding the present case.

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<sup>41</sup> Holmes, *The Common Law* at 211 (cited in note 38).

<sup>42</sup> Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* 43 (Chicago 1999).

<sup>43</sup> Id at 44. “We can imagine a policy science that is wholly unbounded by the past, but it is not law’s rule.” Id at 45 (footnote omitted).

<sup>44</sup> Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1032–33, 1039 (1990).

<sup>45</sup> Dworkin, *Law’s Empire* at 167 (cited in note 29).

Another possible answer to the “must” question is that events in the past can create commitments for the future. Contracts in which performance is to occur over time are the most obvious example. Constitutions and statutes can be thought of as kinds of contract, and a judge-made rule might be conceived of as a promise to the community to decide future cases in conformity with the rule. But these are at best analogies. The sense in which today’s Americans “consented” to the provisions of the Constitution and of statutes is highly attenuated in comparison to the consent that attends the signing of a contract, and the rejection of rigid *stare decisis* makes judge-made rules revocable, attenuating the reliance that they invite and receive. Reliance interests are, though, an example of a commitment that past practices or pronouncements can create; and quite apart from specific reliance, there is a general value in a kind of social or political inertia that takes certain issues off the agenda, such as how many senators each state should have. It is often more important that something be settled than that it be settled just right. To reject historical piety is not to endorse a restless experimentation with political and legal institutions. It is merely to reject piety; but in law that is not a mean accomplishment.

A look into history will often bring to light information that is relevant to dealing with the present and the future. But when this happens, it is the information itself that should shape our response to current problems, rather than the past as such; the past is just a data source. If the only reason that can be given for deciding one way rather than another is that this is how it was done in the past, it is a feeble reason, though good enough if there is no reason to change. The database conception of history is now fairly well understood in relation to judges’ use of “legislative history,” the background out of which a statute or a constitutional provision emerges. What an influential member or committee of the legislature said about the meaning of a bill that was later enacted, or what were the historical events out of which the bill welled, are data that may be helpful in determining the meaning of the enactment. This history is not normative, but just a convenient body of relevant data.

Commitment, reliance, information, even inertia are reasons for standing by decisions made in the past. But to call the past itself normative is a mystification. It might be an indispensable mystification if the general public believed it, because then the legitimacy of judicial decisions might depend upon judges’ accepting the yoke of history. The general public believes something *like* this—that decisions must be “rooted” in authoritative sources of law—but is pretty casual about the sources. Uninterested in and uninformed about history, the public is unlikely to demand that modern cases be decided consistently with

ancient texts and precedents. Otherwise Robert Bork would have been confirmed as a Supreme Court Justice.

Dworkin himself makes no claims to be a historian, and so in practice, as opposed to preaching, treats the past in just the opportunistic way commended by Nietzsche, rarely looking farther into the past than the New Deal, or more commonly the Warren Court, for benchmarks by which to evaluate current decisions.<sup>46</sup> The benchmarks are arbitrary. They are an artifact of the choice of which historical period is to count as normative, a choice determined by Dworkin's ideological preferences. The history of the Supreme Court is one of cycles rather than progress—cycles of innovation and retrenchment, of liberal thrust and conservative parry, conservative thrust and liberal parry. Disinterested judicial historiography would enforce the lesson of cynicism that Nietzsche found so debilitating. Maybe that is why we have so little such historiography.

Another bad reason to embrace a historically oriented jurisprudence is a belief that the quality of the people who make law, mainly judges and legislators, has declined. This is a typical "golden age" fallacy (the type of monumentalistic history-writing, criticized by Nietzsche, that belittles the present)—that the world is going to hell in a handbasket—and is as tenacious as it is naive. It reflects the aging process, which sheds a golden glow over our youth (the nostalgia fallacy, we might call it); selection bias, which leads us to compare the best of the past with the average of the present because time has not yet sorted the best of the present from the average; related to both, a tendency to hero worship that requires a temporally distant hero to make worship a remotely plausible attitude; and, in recent times, the growth of specialization, which makes us feel smaller than our predecessors. If we corrected for these factors that give us a distorted sense of the past, a sense that belittles the present, we would realize that the framers of the Constitution, and outstanding judges such as John Marshall, Holmes, Brandeis, Cardozo, Jackson, and Hand, were, with the exception of Holmes, who had world-class philosophical and literary talents, and Madison, who had penetrating political insights, merely very able lawyers. (Some recent candidates for deification, such as Earl Warren, William Brennan, and Harry Blackmun, are not uniformly acknowledged to have been even that.) There are many equally able lawyers today; if the nation decided it wanted a new Constitution, there would be no shortage of competent drafters. And even if the lawyers and judges of the fabled past were abler than the cur-

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<sup>46</sup> That Dworkin's talk about keeping faith with the past does no actual work in his constitutional jurisprudence is argued in Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution*, 65 *Fordham L Rev* 1269 (1997).

rent crop, they knew so much less than we about conditions today that it is ludicrous to accord them a mystical power over the present. A more plausible view is not that they were abler, but that they rose to the occasion presented by the unusual circumstances in which they found themselves. Crisis brings out the best (or the worst) in people. Harry Truman and even Abraham Lincoln might have been commonplace Presidents under present conditions.

Any votary of deciding modern constitutional cases in conformity with the "original intent" of the framers or ratifiers is thus making a mistake if his ground is that the juvenescence of the United States was the golden age of legal thought. The only good reason for originalism is pragmatic and has to do with wanting to curtail judicial discretion and thus to transfer political power from judges to legislators, including the framers and ratifiers of constitutional provisions and amendments. (The bad reason, because it is question-begging, is that judicial decisions lack legitimacy if they are the product of an exercise of judicial discretion; the question begged is the validity of the idea of legitimacy that compels this conclusion.) It may not be a *very* good reason, for there are other ways of limiting judicial discretion besides trying to tether judges to a time line. My point is only that criticisms of originalism as bad history miss the point of originalism. The point is to curb judicial discretion by adopting a mechanical method of interpretation, one essentially lexicographical and algorithmic rather than historicist.

I have suggested that a policy of generally adhering to precedent, that is, of deciding cases in the same way that like cases have been decided previously, both economizes on judges' and lawyers' time and enables the decided cases to serve as guides to persons who want to avoid being sued.<sup>47</sup> The policy need have nothing to do with a veneration of the past unless it is pushed to the point at which judges, like foreign-policy makers preoccupied with historical analogies (a form of precedent), prefer strained analogies to acknowledging the need to deal with novel issues without the crutch of precedent. Almost everyone would agree that a historical analogy cannot be used as a cookie cutter that will stamp out the answer to a current issue of policy. This is easy to see because history never repeats itself exactly. At best the historical analogy furnishes a lesson that may be applicable to a current problem. In the case of legal precedent, the cookie-cutter method will work sometimes; some cases are undeniably identical in all conceivably relevant respects to previously decided cases. But when they are merely "analogous," there is no metric of similarity that will enable a later case to be decided by reference to a former one, just as

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<sup>47</sup> Posner, *Economic Analysis of Law* at 595–96 (cited in note 28).

there is no metric of similarity that would have enabled Lyndon Johnson to figure out whether abandoning South Vietnam to her fate would have been "another Munich."

Historical analogies are causal; the Munich accord is used to show that if we act in a certain way, the same dire outcome will follow. Legal precedent is normative; the new case is to be decided the same way as the former one because they are relevantly alike. But the pitfalls are similar. Notions of likeness are vague. The valid use of either type of analogy, the historical or the legal, is to extract a principle, or consideration, which can then be used to illuminate a subsequent event or case. In neither case, then, is history normative; it is merely a source of potentially useful data.

In the case of history, arguments from analogy are plagued by the difficulty of evaluating counterfactual historical assertions.<sup>48</sup> We cannot rerun history without the Munich accord and see what would have happened. To assess a historical counterfactual, we need a historical law,<sup>49</sup> such as that appeasement invites further aggression; if we are confident that the law is sound (a confidence hard to come by in historical inquiry, however), we can predict the consequences of an act of appeasement, such as the Munich accord. But not otherwise. Similarly, to make a legal argument from analogy requires the legal analyst to extract a principle from the prior cases that covers the current case.<sup>50</sup> The prior cases, as such, are not normative any more than history is.

#### D. The Optimal Age of Judges

The historicist approach to law has, perhaps surprisingly, implications for the optimal age of judges, a subject about which the extensive scholarly literature on judges and courts is largely silent.<sup>51</sup> The older one gets, the more one lives in the past. A very young person has little to draw on in his past by way of resources for coping with the present, but his powers of imagination and ratiocination are at their peak. An

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<sup>48</sup> Professional historians acknowledge this problem. See, for example, Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge 1988).

<sup>49</sup> See Fred Wilson, *Laws and Other Worlds: A Humean Account of Laws and Counterfactuals* 72–89 (D. Reidel 1986). For an example of how economic theory can be used to test a counterfactual historical assertion, see Raymond Dacey, *The Role of Economic Theory in Supporting Counterfactual Arguments*, 35 *Phil & Phenomenological Res* 402 (1975). And for an example from game theory, see Bruce Bueno de Mesquita, *Counterfactuals and International Affairs: Some Insights from Game Theory*, in Philip E. Tetlock and Aaron Belkin, eds, *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives* 211 (Princeton 1996). I do not deny the existence or discoverability of genuine historical laws, but merely emphasize the difficulty and uncertainty of the undertaking.

<sup>50</sup> See Richard A. Posner, *The Problems of Jurisprudence* 86–100 (Harvard 1990).

<sup>51</sup> I have taken a whack at the subject in my book *Aging and Old Age* ch 8 (Chicago 1995).

old person has waning powers of imagination and ratiocination, but a rich store of recollections to use as templates—as “precedents” in almost a literal sense—for solving new problems by comparing them with old ones. The young person can always read about the past, but what a person takes away from what he reads depends critically on what he brings to his reading. The past is less vivid to one who reads about it than to one who has lived it.

It may not be an accident that the average age of judges is lower in Continental legal systems than in common law jurisdictions. The proximate cause of the difference is that Continental judiciaries are career judiciaries; people enter them shortly after they get their law degree, while in common law systems judges generally are lateral entries from practice or teaching. Continental adjudication is more formalistic, more “logical,” than Anglo-American adjudication, and there is, concomitantly, less emphasis on adherence to precedents. Because logic is more a tool of the young for solving problems, and precedent more a tool of the old, we should not be surprised to find younger judges in a legal system that emphasizes logic and older judges in one that emphasizes precedent. I acknowledge, however, the possibility that the causation is the reverse of what I’ve described—that it is the character of the Anglo-American judicial career that is responsible for the less formalistic character of Anglo-American adjudication.

#### E. The Historicist Judge versus the Pragmatic Judge

The historically oriented judge that I have been describing—this elderly chap who wants to decide cases in a way that will display their pedigree, their continuity with earlier cases, statutes, or constitutional provisions—may seem poles apart from the pragmatic judge, who wants to decide cases in the way that will best promote, within the constraints of the judicial role, the goals of society. The pragmatic judge uses history as a resource, but does not venerate the past or believe that it ought to have a “special power” over the present. As Holmes memorably remarked, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>52</sup> Yet the two types of judge may not be as different as they seem. I said earlier that history provides a useful mask for decisions reached on other grounds. I add here that it is almost always a mask because of the indeterminacy of most historical inquiries of the sort that might be thought to bear on legal decisionmaking; and behind the mask may be a pragmatist.

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<sup>52</sup> Oliver Wendell Holmes, *The Path of the Law*, in Posner, *The Essential Holmes* 160, 170 (cited in note 7).

I am not arguing that the facts of history lie beyond our ken, that the historically oriented judge is therefore an impossibility. Even though we cannot (except in astronomy) actually observe events that occurred in the past, we can have enormous confidence in many facts about them, for example that George Washington was the first President of the United States or that France was defeated in the Franco-Prussian war.<sup>53</sup> But it is not facts to which judges and law professors appeal when they are arguing about the interpretation and application of constitutional and statutory provisions and previous judicial decisions. History in the narrow sense of what happened does not reveal meaning. It might tell us what certain words in the U.S. Constitution meant in the 1780s, or what the provenance of certain constitutional provisions was, or what someone said about their meaning at the time; but there is an unbridgeable gap between uninterpreted historical data, on the one hand, and claims about the meaning of constitutional provisions in cases decided today, on the other. The sorts of claims that judges and law professors like to make about history are simply not verifiable, because they depend not on facts but on disagreements about the interpretive process itself. We know for example that the framers and most of the ratifiers of the Fourteenth Amendment did not regard blacks as the social or intellectual equals of whites, but we do not know what to make of this bit of historical lore when the issue is whether the amendment's equal protection clause forbids public school segregation.

There are two problems here, not one. The first is the elusiveness of historical Truth—not the truth of facts that compose a simple narrative or chronology, or even of statistical inferences from historical data, but the truth of causal and evaluative assertions about history. The second problem, which arises when the issue is the meaning of some historical event or document, and thus an interpretive issue, is the indeterminacy of the choice of interpretive approach. When one law professor says that the equal protection clause is about securing the basic political equality of blacks and another that it is about creating an evolving, generative concept of equality, their disagreement is over interpretive theory and cannot be resolved by a deeper or better study of history. History might reveal the interpretive presuppositions of the drafters or ratifiers of an enactment, but it would not reveal the weight that a modern interpreter should give to those presuppositions.

No doubt there are situations in which a knowledge of history, and not just of the history of a doctrine, is important in legal decisionmaking. In interpreting the term “high Crimes and Misdemean-

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<sup>53</sup> These are examples of the robustness of “testimony” (in the philosophical sense) as a source of knowledge, the theme of Coady’s important book, *Testimony* (cited in note 2).

ors” in Article II of the Constitution, for example, we may not want to stop with the eighteenth-century meaning of the term and with the discussion of it in the constitutional convention, but we will probably want to start there; otherwise we may stumble badly over the word “misdemeanor,” which today means a minor crime but which then had a much broader signification.<sup>54</sup> Even less problematic is the use of history that Holmes himself most fancied, that of showing that a modern doctrine is just an historical vestige, and so ought to be discarded; or the use of history to shoot down the ignorant historicism found in too many judicial opinions.<sup>55</sup>

There is no problem with judges using history in these, or for that matter other, ways when there is a consensus among professional historians. But when there is not, the judges must find a method other than history of resolving whatever legal dispute the history has been brought to bear upon. Legal professionals are not competent to umpire historical disputes. Because they are not, inevitably they pick the side of the dispute that coincides with their preferences based on different grounds altogether.

Sophisticated originalists know this. They do not want to substitute amateurish inconclusive debates over history for professional but inconclusive debates over policy or values. They want, or at least ought to want (for they often yield to the temptation of doing what legal historians with proper derision call “law office history”<sup>56</sup>), a narrowly focused inquiry into precise and answerable questions of historical meaning of specific words and sentences, coupled with a list of “canons of construction” that will enable those historical meanings to be brought to bear on contemporary issues.

The originalists of the present day, such as Justice Scalia, are reacting to the exercise of free-wheeling judicial discretion by the courts during the era of Earl Warren and, to only a slightly lesser extent, of his successor, Warren Burger. The originalists want to minimize judi-

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<sup>54</sup> For example, Johnson’s dictionary defines it as “offence; ill behaviour; [or] something less than an atrocious crime.” Samuel Johnson, *A Dictionary of the English Language* (Arno 1979). See also Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* ch 3 (Harvard 1999).

<sup>55</sup> For an example picked almost at random, consider *United States v Curtiss-Wright Export Corp.*, 299 US 304, 316–18 (1936), where the Supreme Court said that the war power of Congress differs from the commerce power in not having been among the sovereign powers of the states before the Constitution was promulgated. Charles Lofgren, a professional historian, pronounced the historical discussion in *Curtiss-Wright* “shockingly inaccurate,” and I do not believe that his evaluation has been questioned. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 Yale L J 1, 32 (1973). See also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617, 1660 n 184 (1997).

<sup>56</sup> For examples of highly debatable historical excursus by originalist judges, see *Plaut v Spendthrift Farm, Inc.*, 514 US 211, 219–25 (1995); *Michael H. v Gerald D.*, 491 US 110, 127 n 6 (1989) (Scalia) (plurality); *United States v Lopez*, 514 US 549, 584 (1995) (Thomas concurring).



cial discretion and they have devised a kind of algorithmic mechanism for doing so. The historicists in law want no such thing. They mainly want to forge an historical pedigree for their preferred positions in order to deflect charges of judicial creativity. Richard Fallon has it backwards when he suggests that disingenuous rhetoric is inherent in pragmatic adjudication.<sup>57</sup> A pragmatist might or might not adopt a formalist rhetoric, historicist or otherwise; but the adoption of a historicist rhetoric is a sure sign that the judge is not disclosing the true springs of decision.

Originalism is thus, in a queer but I think valid sense, a response to the difficulty of resolving contested historical issues rather than a school of historical jurisprudence. But those who are not much drawn to originalism, and must cast about for some alternative to history as the method of resolving cases, are open to the criticism that the difficulty of getting history right is relevant only if there is a *simple* alternative. If the alternative is policy analysis, as some pragmatists would be inclined to answer, this may seem to be jumping from the frying pan into the fire—substituting for one indeterminate inquiry another equally indeterminate one. But in grappling with issues of policy the judge is at least dealing with something that matters, and he can hope to make some progress and reduce error. Moreover, he is facilitating error-correction by not hiding behind a claim to possess an arcane methodology impenetrable to “mere” policymakers and other noninitiates. And perfection in historical inquiry, even if attainable, would answer one objection to historical inquiry but leave unanswered the more basic one: why *should* the past rule the present?

### III. HISTORICISM IN LEGAL SCHOLARSHIP: THE CASE OF BRUCE ACKERMAN

I have been discussing the risks of historicism for adjudication. It poses risks for legal scholarship as well, as I shall argue with reference

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<sup>57</sup> See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Cal L Rev 535, 574 (1999). Fallon says that “by inviting judges to act on their personal views of what would make the future better, pragmatism would authorize judicial behavior that offends both rule-of-law and democratic values.” Id. But pragmatism does not license decisionmaking according to *personal* views, which would be mere willfulness; rather, it asks the judge to focus on the social consequences of his decisions. Fallon acknowledges that the pragmatist might want judges to consider rule-of-law and democratic values, but infers from this that “pragmatist judges might therefore follow established rules except where it would be very costly to do so, and they might write disingenuous opinions purporting to accept the authority of past decisions even when they were setting out in new directions that they thought better for the future.” Id. But why would they feel constrained to write disingenuous opinions? Why could they not say, as judges frequently say, that an existing rule must bend to take account of changed or special circumstances? The references in Fallon’s discussion of pragmatic adjudication indicate that he derives his conception of it not from anything that pragmatists have written but from Ronald Dworkin’s tendentious characterizations.

to one of the most ambitious historicist efforts of current legal scholarship—Bruce Ackerman's effort to prove that Article V of the United States Constitution does not provide the exclusive method of amending the Constitution.<sup>58</sup> I shall suggest despite my own misgivings that Nietzsche might have looked approvingly on Ackerman's method.

Article V creates a procedure, or rather two procedures, for amending the Constitution. The first requires that each house of Congress approve a proposed amendment by a two-thirds vote and that three-fourths of the states then ratify the proposal. The second requires Congress, upon the application of the legislatures of three-fourths of the states, to convene a constitutional convention; any amendment proposed by the convention must, as under the first procedure, be ratified by three-fourths of the states. The second procedure has never been used. The original Constitution was promulgated by a convention and then ratified by the states, but of course it was not a convention summoned pursuant to Article V, which did not yet exist.

As evidence that the Constitution can be amended without complying with Article V, Ackerman cites the amendments adopted after the Civil War—the Thirteenth through Fifteenth Amendments. He says that their adoption violated Article V in a variety of ways, but what his argument boils down to is that the victorious North rammed the amendments down the throat of an unwilling South. Without that coercion, the amendments would not have been ratified, at least not as soon as they were, by the required three-fourths of the states.<sup>59</sup>

Ackerman further argues that the Constitution was amended completely outside the precincts of Article V during the New Deal, when no formal amendments were made except the ones, irrelevant to his thesis, abolishing Prohibition and moving up the date on which the President takes office after being elected from March to January. The New Deal "amendments" that count for Ackerman are decisions by the Supreme Court that expanded federal power over the economy and shifted the emphasis in constitutional liberty from the economic sphere to the political and the personal spheres. He does not consider the absence of formal constitutional text a critical difference between the Reconstruction and New Deal amendments. The significance of the Reconstruction amendments lies not in what they said—lies not,

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<sup>58</sup> This is a major aim of Bruce Ackerman's projected trilogy, *We the People*, of which two volumes have been published. See Bruce Ackerman, 1 *We the People: Foundations* (Belknap 1991); Bruce Ackerman, 2 *We the People: Transformations* (Belknap 1998). I focus here on the second volume.

<sup>59</sup> Ackerman, 2 *We the People: Transformations* ch 8 (cited in note 58).

that is, in the enacted text—but in what they symbolized: a fundamental shift of power from the states to the federal government.<sup>60</sup>

Ackerman's precedent for the usurpative-seeming amendment processes of the Reconstruction and the New Deal is the adoption of the original Constitution. The framers exceeded their terms of reference from the Continental Congress. The Congress had authorized convening a constitutional convention to amend the Articles of Confederation and the Articles required that amendments be unanimous, despite which the convention specified that the new Constitution, displacing (and so radically "amending") the Articles of Confederation, would take effect upon ratification by nine of the thirteen states. Ackerman believes that in all three instances compliance with the legally prescribed requirements for amendment would have taken too long. He concludes that, as a consequence of the informal amendments, the United States has had not one but three constitutional regimes. We live not under the 1787 Constitution as amended and interpreted, but under the 1787 Constitution, a Reconstruction Constitution, and a New Deal Constitution, all irregularly promulgated but nevertheless valid.

Ackerman is not alone in believing that the "Constitution" we live under today bears only a modest resemblance to the document drafted more than two hundred years ago. But he does not regard this situation, as others do, as the consequence of misinterpretations, judicial willfulness, or a felt need to adapt the written Constitution to social change through a process, namely judicial interpretation, less cumbersome than the amendment process. He regards the divergence between the original and today's "Constitution" as the consequence of what he claims is the dualist nature of American politics. Most of the time, Americans are apathetic about politics. This is the time of "ordinary politics"—a sordid, at best uninspiring business of interest-group politics, logrolling, lobbying, quasi-bribery, misrepresentations, and general selfishness. But in times of crisis people become attentive and involved. The policies that emerge during these periods of heightened public attention to political issues constitute a higher order of lawmaking to which the courts and other agencies of government are obliged to defer until the next upheaval yields a comparably authentic expression of the popular will. It would thus be *unconstitutional* for the Supreme Court to overrule the leading decisions of the New Deal era, even if those decisions were erroneous interpretations of either the original Constitution or the Reconstruction amendments; those decisions are constitutional amendments.

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<sup>60</sup> Id.

Ackerman's analysis would, if accepted, rehabilitate—though not resurrect—a host of decisions by the Supreme Court that have seemed either erroneous or at least questionable to most constitutional scholars. These decisions include *Lochner*<sup>61</sup> (striking down a state maximum-hours law), *Adkins*<sup>62</sup> (striking down a federal child labor law), *Radford*<sup>63</sup> (striking down a federal debtors' relief law), *Griswold*<sup>64</sup> (striking down a state law prohibiting the use of contraceptives by married couples), and *Roe*.<sup>65</sup> Ackerman argues that the first three decisions appropriately honored the libertarian premises of the Reconstruction amendments. For, he claims, those amendments were intended to protect "free labor" not only by outlawing slavery but also by preventing governmental interference with employment contracts.<sup>66</sup> The last two decisions, *Griswold* and *Roe*, honored the personal-libertarian premises of the New Deal "amendments." Ackerman thus challenges the conventional history of constitutional law, which denies that the Constitution has been amended as extensively as Ackerman believes, attributes overruled decisions such as *Plessy*<sup>67</sup> and *Lochner* to prejudice, error, or class bias rather than to supersession by constitutional amendment, and honors the dissenters in such cases (such as the first Justice Harlan, Holmes, and Brandeis) rather than the authors of the majority opinions.

Ackerman believes that Ronald Reagan, and more recently Newt Gingrich, attempted to launch an extratextual amendment process aimed at overruling the New Deal "amendments," but that Reagan was thwarted when his nomination of Robert Bork to the Supreme Court failed Senate confirmation as was Gingrich when Clinton was reelected President.

There is much to be said against Ackerman's argument from the perspective of customary methods of legal and historical interpretation. The procedures specified in Article V for amending the Constitution are obviously designed to make amending difficult. They would fail to do so if alternative, less demanding procedures could be employed by Congress or the Supreme Court to bring about the same result. Even if the alternative procedures were not, or not clearly, less demanding, but merely different, their existence would inject a high order of uncertainty into constitutional politics. Supporters and opponents of proposed legislation, or of proposed judicial interpretations

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<sup>61</sup> *Lochner v New York*, 198 US 45 (1905).

<sup>62</sup> *Adkins v Children's Hospital*, 261 US 525 (1923).

<sup>63</sup> *Louisville Joint Stock Land Bank v Radford*, 295 US 555 (1935).

<sup>64</sup> 381 US 479.

<sup>65</sup> 410 US 113.

<sup>66</sup> Ackerman, 2 *We the People: Transformations* ch 9 (cited in note 58).

<sup>67</sup> *Plessy v Ferguson*, 163 US 537 (1896).

by the Supreme Court, could never be entirely sure whether they were jousting over “mere” legislation or “mere” judicial interpretations—or over amendments to the Constitution. Congress would not know when it was entitled to legislate in the ordinary way and when it must use Article V, or how to proceed if it wanted to amend the Constitution without recourse to Article V (which, remember, Ackerman does not believe is or should be the exclusive method of amending the Constitution). If Congress tried to overrule a decision of the Supreme Court by ordinary legislation, the Court could thwart Congress by declaring the decision to have constitutional stature; and so the approach that Ackerman depicts and approves would, if generalized, alter the balance of power between Congress and the courts, with unpredictable results.

Ackerman’s approach of treating the structural features of the Constitution as optional cannot logically be limited to Article V. The approach implies that Congress or the President (or perhaps the courts) might add to the federal government a third house of Congress, a dictator who would give orders to the President, a court empowered to review decisions by state courts on matters of state law, or a separate mode of impeaching and removing the President—for none of these additions is expressly forbidden by the Constitution. If Article V is not a limitation on congressional power, why should any of the other provisions that establish the structure of the federal government be treated as limitations?

Ackerman’s approach *makes* Article V inadequate, rather than revealing and curing its inadequacy. If judges did not enforce extratextual amendments—if, for example, they had not held much of the early New Deal legislation unconstitutional because (on Ackerman’s interpretation of what the Supreme Court was doing—and rightly doing) it infringed the extratextual Reconstruction amendments—there would be little need for recourse to Article V and hence little pressure to circumvent it. The New Deal legislation would have been upheld (most of it, anyway), and so Roosevelt would not have had to try to coerce the Supreme Court by proposing his Court-packing plan. Ackerman proliferates constitutional amendments. His Constitution is longer than anyone else’s, and the more provisions a Constitution has, the easier the amending process must be made in order to prevent governmental paralysis.

Strict adherence to Article V as the exclusive mode of amending the Constitution would not, as Ackerman argues, have required the Court to invalidate the Reconstruction amendments. The Court could have taken—in fact has taken—the position that Congress has the final say on when an amendment shall be deemed adopted and in

force.<sup>68</sup> The Court based this decision on the “political question” doctrine, which the Court invented and occasionally applies when necessary to avoid massive intrusions into the operations of other branches of government. Legal formalists may decry such prudential abstentions, but Ackerman is not a formalist and never makes clear why he considers the “political question” route an unsatisfactory means of legitimizing the Reconstruction amendments, though he might argue that the doctrine avoids rather than resolves the issue of legality.

Nor is it clear that the Reconstruction amendments were the product of “coercion” in a pejorative sense of the term. The Civil War began with an unprovoked attack by South Carolina on Fort Sumter. The national government was entitled to defend itself, and the occupation of an enemy’s territories is a lawful outcome of a lawful war. The military governments installed by the national government at the conclusion of the Civil War hence were lawful and could have compelled the congressional delegation of each of the occupied states to vote for the proposed amendments and could have then, when Congress adopted them by the requisite supermajority and sent them to the states, voted to ratify them. So it is far from clear that the Reconstruction amendments violated Article V. Nor could the original Constitution have violated it. Two of the three struts of Ackerman’s historical analysis collapse. And the third, the idea that a number of judicial decisions during the New Deal era have constitutional status, is the least plausible because of the absence of any textual “handle” corresponding to the original Constitution or the Reconstruction amendments.

But my interest is less in the soundness of Ackerman’s historico-legal argument than in his conception of history. It lies at the opposite extreme from history conceived as a collection of data, and in its abstractness and interpretive ambitions would place upon the courts the unworkable burden of identifying constitutional “moments” and determining which aspects of them should be accorded constitutional dignity. His type of historiography would place a heavy burden on critics of the courts as well. The conformity of a judicial decision to the text or background or purpose of particular constitutional provisions, or to past decisions interpreting those provisions, or to sensible public policy, or to other values, would be irrelevant to an evaluation of the decision’s soundness. The only relevant conformity would be to some past *Zeitgeist*.

The difficulty of this style of historicizing is shown by Ackerman’s attempt at it. Key decisions of the Supreme Court refute him. In cases like *Plessy* the Supreme Court refused to recognize liberty of contract;

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<sup>68</sup> *Coleman v Miller*, 307 US 433 (1939).

this suggests, contrary to Ackerman's argument, that the Court was not enforcing some extratextual Reconstruction amendment that guaranteed such liberty against curtailment by the states. The Supreme Court left Jim Crow, an affront to federal power, severely alone during the entire period of the "Reconstruction Constitution" that in Ackerman's view decisively strengthened federal power over the states.

Cases like *Brown*<sup>69</sup> and *Griswold* cannot be attributed to the New Deal "amendments"; neither public school education nor sexual liberty was an interest of the New Deal. Moreover, Ackerman's interpretation of the Bork nomination as an effort to repeal the New Deal "amendments" is equally groundless. Had Reagan been able to fill up the Supreme Court with Borks and Scalias, *Roe* might have been overruled, affirmative action declared unconstitutional, prayer allowed in public schools, the constitutional rights of criminal defendants further curtailed, and the power of the federal government over the states reduced. Only the last item on this agenda—which at this writing a less conservative Supreme Court is nevertheless pursuing vigorously—would have brushed up against New Deal legislation, and then only lightly. Indeed, the net effect of the overrulings by a Bork-Scalia Court would be to return constitutional law to where it was when FDR died! Neither Bork nor Scalia believes that *Lochner*, *Adkins*, or any of the other decisions that constituted the Reconstruction Constitution were correctly decided. Neither believes in constitutionalizing economic rights à la Richard Epstein, who believes that *Lochner* was correctly decided and that much of the New Deal was unconstitutional.<sup>70</sup>

Ackerman particularly wishes to establish the similarity of the three constitutional moments that he has identified to each other and their dissimilarity to the failed fourth moment of Reagan and Gingrich. This exercise in historical analogy-making carries Ackerman deep into the archives. The body of primary and secondary materials relevant to an understanding of the three historical periods that Ackerman studies is vast; only a historian can evaluate Ackerman's selection from and interpretation of it.<sup>71</sup> Ackerman is not a historian, and historical research is only a part of his academic work. History, like

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<sup>69</sup> *Brown v Board of Education*, 347 US 483 (1954).

<sup>70</sup> Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 279–81 (Harvard 1985).

<sup>71</sup> For assessments (both critical and admiring) of Ackerman's project by professional historians and others, see Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 Yale L J 1917 (1999); Colin Gordon, Book Review, *Rethinking the New Deal*, 98 Colum L Rev 2029 (1998); Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 Case W Res L Rev 885 (1996); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan L Rev 759 (1992).

most academic fields, is increasingly specialized. The more specialized a field, the greater the disadvantage of the nonspecialist; the more "amateurism" becomes a danger and a deserved reproach.<sup>72</sup>

No one will deny the ingenuity of the historical parallels that Ackerman draws. He matches the Reconstruction Act of 1867, which he treats as having amended Article V of the Constitution by conditioning the readmission of the southern states' senators and congressmen to Congress upon those states' voting to ratify the Fourteenth Amendment, with Article VII, which had diluted the unanimity requirement of the Articles of Confederation. He matches the radical Republicans who controlled Congress during Reconstruction to Franklin Roosevelt, and matches Andrew Johnson—the border-state President who was Lincoln's successor and opposed the radical Republicans—to the Supreme Court that tried (at first with some success) to thwart the New Deal. For Ackerman, the fact that these powerful efforts to prevent the "enactment" of the irregular amendments (coerced, in the case of the Reconstruction amendments, and nontextual, in the case of the New Deal amendments) failed—that the current of reform was able to overcome such resistance—proves the strength of the popular will and thus verifies the existence of true constitutional moments. More, it shows that the failure of regular enactment in the Reconstruction and New Deal eras was a trivial detail, on par with a misspelling in a judicial commission. Had President Johnson not flinched during the trial of his impeachment, he would have been convicted, removed from office, and replaced by a radical; if Secretary of State Seward had refused to proclaim the adoption of the Fourteenth Amendment, Congress would have overridden him; and if the Supreme Court in 1937 had not abandoned its opposition to the New Deal, Roosevelt's Court-packing plan would have been enacted.<sup>73</sup>

I do not know whether these or any of the other counterfactual claims or "alternative histories" with which Ackerman's book is studied are true. (The one about Johnson is the most plausible.) That is for professional historians to say, if they can. My guess is they will say it is impossible to speculate responsibly about such counterfactuals, posed by Ackerman, as Lincoln's having survived his second term or Roosevelt's having failed to survive his first term, enabling John Nance Garner to become President and play Andrew Johnson's role in resisting a radical Congress. No "laws" of history predict the outcomes of these counterfactuals. The student of Nietzsche will be

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<sup>72</sup> This point cuts both ways, as shown by the failure of professional historians to have contributed constructively to the debate over the impeachment of President Clinton. See Posner, *An Affair of State* at 234–37 (cited in note 54).

<sup>73</sup> Ackerman, 2 *We the People: Transformations* at 228, 233, 345 (cited in note 58).



tempted to remark that Ackerman's study of history is not oriented to issues of truth at all.

Even if Ackerman with the benefit of hindsight could answer all the "what if" questions correctly, it would not follow that, as he believes, judges should dispense with the formalities of enactment by attempting to answer counterfactual questions about recent or contemporary controversies. The logic of Ackerman's approach is that if a court were confident that some law would be passed by Congress and signed by the President, but for some irrelevant reason (maybe just an oversight by the clerical staff in one of the houses of Congress, or a filibuster on an unrelated issue) it was not enacted, the court could go ahead and enforce it as if it had been enacted. Formalist readers of Ackerman may come away with their faith strengthened, and pragmatists may be forced to acknowledge that formalism has a legitimately pragmatic role to play in law. The statute under which Seward acted, requiring the Secretary of State to certify as valid a constitutional amendment when it has been ratified by the requisite number of states, begins to be a rather appealing formality; Ackerman calls the certification a "legalistic piece of paper."<sup>74</sup>

Ackerman's effort to identify three constitutional "moments"—three peaks in U.S. history—and consign the rest of our history to the plains is excessively schematic. He ignores such other plausible candidates for moments of heightened public attention to political matters as the Revolutionary War itself, which produced the Declaration of Independence (which Lincoln always treated as one of the founding documents of the American "Constitution") and the Articles of Confederation; the first few decades under the Constitution, with the tug of war between the Federalists (including John Marshall) and the Jeffersonian Republicans over whether the national government would be effective; the Presidency of Andrew Jackson, which inaugurated populist democracy; and the Progressive era, embracing the Presidencies of Theodore Roosevelt, Taft, and Wilson, which gave us trust-busting, the Federal Reserve Act, the national park system, and the independent civil service.

The second volume of Ackerman's trilogy ends with a radical proposal for amending Article V—extraconstitutionally of course. The proposal is to empower the President, upon being reelected, to propose constitutional amendments that would be placed on the ballot at the next two Presidential elections and if passed would become formal amendments to the Constitution. In other words, a President popular enough to be reelected would be empowered to sponsor two referenda spaced four years apart, and concordance of the results of the

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<sup>74</sup> *Id.* at 154.

referenda would make the proposals part of the Constitution. The proposal would be embodied in a statute that would provide that it would take effect if proposed by a second-term President and passed by a two-thirds majority of Congress and then supported by the voters at the next two Presidential elections. In other words, like the original Constitution, the statute would prescribe its own mode of achieving the status of a constitutional provision.<sup>75</sup>

The motive behind this proposal is obscure, as it is not addressed to the historical events that provide Ackerman's evidence for its needfulness. It is irrelevant to the founding; and as for Reconstruction, a proposal for constitutional amendments under the procedure advocated by Ackerman could not have been made until 1872, when Grant was reelected, or adopted until 1880—by which time Reconstruction was over and no Reconstruction amendment could have passed. The New Deal amendments could not have been made until 1936, when Roosevelt was reelected, or adopted until 1944, when World War II was in full flow and the New Deal largely forgotten. The proposal is addressed to problems that have not arisen and may never arise, while failing to address the problems that give rise to it.

The disjunction between the history that Ackerman narrates (or creates) and the proposal for policy change in which his historicizing culminates is a further indication that he does not see history as a source of data that may cast warning and other lights on the problems of today, in the way, for example, that the economic crisis between the election and inauguration of Franklin Roosevelt suggested the need to compress the Presidential lame-duck period. The crises that Ackerman recounts were overcome *more* satisfactorily than they would have been had his proposal been in effect, because his proposal requires a longer period of time for implementing reform than would have been feasible. Rather, Ackerman sees history in its interpretive as distinct from its factual sense as the appropriate method of legitimizing a radical proposal: the proposal is okay because something like it was used in the past. The pragmatic social reformer will not be happy with such an approach. He is less interested in whether a radical proposal has a pedigree, let alone an invented one, than in whether its benefits outweigh its costs. He would prefer Ackerman to concentrate on that question, the answer to which is more dubious than he assumes, rather than to build historical sand castles.

Ackerman does not believe that the past is normative or want to return us to the original understanding of the Constitution-amending process. His aim is to make his radical proposal seem natural by presenting historical analogies to it and desirable by identifying historical

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<sup>75</sup> Id at 410.

crises that might have been averted had something like his proposal (for I have noted the oddity that the proposal itself would not have averted any of them) been in effect. But these are just other ways than that of Blackstone or Savigny or their avatars in which lawyers' historicizing is marked as rhetorical rather than scientific in a way that Nietzsche's critique of the study of history can help us to understand—and maybe to forgive. Nietzsche, we recall, commended the use of history by “the man of deeds and power, [ ] him who fights a great fight, who needs models, teachers, comforters and cannot find them among his contemporaries.” (p 67). We might think of Ackerman as reaching back to the great men of the past for models and teachers in his work of overcoming the limitations of Article V. If he is right that the Constitution has been amended extratextually in the past, and if the nation would have been better off if this had been recognized, maybe the Constitution can and should be amended extratextually in the future. History reveals possibilities and by doing so emboldens us to consider changes in our current methods. An exercise in selective remembrance and selective forgetting, Ackerman's project may come closer than that of other legal historicists to satisfying Nietzschean criteria for constructive engagement with history. This conclusion may, however, raise doubts about the normative significance of the constructive aspect of Nietzsche's essay.

Consider the type of history that Nietzsche himself did, notably in *On the Genealogy of Morals*. Though the *Genealogy* purports to be a history of morality, it is unlike anything a professional historian would write—or, rather, would have written before the profession's recent rediscovery, in the spirit of Nietzsche, that “history can be redescribed as a discourse that is fundamentally rhetorical, and that representing the past takes place through the creation of powerful, persuasive images which can be best understood as created objects, models, metaphors or proposals about reality.”<sup>76</sup> The *Genealogy* is edifying rather than scientific history—an argument that is cast in narrative, in historical, form for the sake of vividness, rather than being an attempt to “get right” the events in history. It is historicizing in the service of life, and in like manner we might consider Ackerman's trilogy in the service of life—or at least in the *attempted* service of life.

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<sup>76</sup> Hans Kellner, *Introduction: Describing Redescriptions*, in Frank Ankersmitt and Hans Kellner, eds, *A New Philosophy of History* 1, 2 (Chicago 1995). More generally, see Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins 1973).